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Supreme Court, U.S.
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No. 98-390

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

MICHAEL K. DePAEPE, executor of the estate of Kenneth J. DePaepe,

Petitioners

v.

GENERAL MOTORS CORPORATION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF FOR PETITIONER IN SUPPORT OF CERTIORARI

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REPLY BRIEF OF PETITIONER IN SUPPORT OF CERTIORARI[1]

1. Respondent's lengthy defense of the Seventh Circuit's much shorter opinion is designed to obscure the central ruling below and thereby persuade the Court that this is not a certworthy case. Beginning with its reversal of the order of the questions presented, and hence the reasons for granting (or denying the petition), respondent seeks to recast the case from one raising an issue going to the heart of how the Department of Transportation ("DOT"), through the National Highway Traffic Safety Administration ("NHTSA"), regulates automobile safety, to one in which the issue is no more than whether the court of appeals misapplied the standard for determining harmless error.

Despite respondent's efforts, the central issue presented by the petition remains whether the court of appeals was correct in its ruling that DOT has the authority to issue pure design standards, containing no enforceable performance elements, and that the sun visor standard is such a standard. Even when respondent does turn to that general topic, it never attempts to defend what the court of appeals actually held. Nor can it reconcile the principles underlying the decision below with other appellate decisions, the views of DOT, or the long-standing position of the automobile industry on the authority of DOT to issue a pure design standard. Indeed, beginning with the question presented -- which respondent revised as whether the

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[1] As used in this reply, "Pet. App." means the appendix to the petition in this Court; "Opp." means respondent's brief in opposition; and "App" and "Supp. App" mean, respectively, the appendix and the supplemental appendix in the court of appeals.

court of appeals properly held that the sun visor standard "does not impose a specific performance standard," rather than whether it was a valid design standard -- through the statement of the case and reasons for denying review, respondent is unremitting in its efforts to shift the focus away from the Seventh Circuit's unprecedented ruling.

As part of this effort, respondent claims that the decision to order a new trial was independently based on the "enforced quietus" that the district court imposed on respondent after petitioner had allegedly been allowed to present evidence and to argue to the jury that respondent had violated the sun visor standard (Opp. at 1). We show below that the factual predicate of that allegation is without basis for both petitioner and respondent, but it is equally unavailing as a matter of law. Thus, respondent can only have suffered a legitimate injury from any "enforced quietus" if it had the right to argue to the jury that it had complied with the sun visor standard as a matter of law, since it could always have argued (but chose not to argue) that the protection provided was reasonable. But that compliance argument is a permissible one *only* if the standard is a valid design standard, even though it lacks any performance requirements, which is the principal question presented by the petition. Far from being an independent ground for sustaining the decision below, the "enforced quietus" argument only reinforces petitioner's point that the issue of whether DOT has the power to issue design standards that lack any performance aspects is the central and outcome-determinative issue in this case.

2. Respondent attempts to avoid review by citing cases that state that there may be design elements in standards properly issued by DOT. We agree, and in some cases, the design aspects of a standard (such as the size of the sun visor

here) are inevitable and integral parts of any sensible regulation. But this is not what the court of appeals meant when it said that standards "come in two flavors: design and performance" (Pet. App. 3a), or when it held that the sun visor rule was a design standard and that respondent had satisfied it by having a sun visor with the required design elements, even if its visor provided no protection to vehicle occupants in a crash. *Id.* at 5a. It was only because the court of appeals concluded that the sun visor standard was a pure design standard and that it was invalid as a performance standard that it found reversible error. But even that error was arguably significant only because the district court had refused to allow respondent to argue that it had complied with the standard as a matter of federal law. Indeed, if the court of appeals had found that this standard was a mixed design and performance standard, there would have been no prejudicial error on an "enforced quietus" theory since both sides would have been silenced, making any error harmless.[2]

Contrary to respondent's opposition, the decisions of other courts of appeals are wholly inconsistent with the ruling here. To be sure, no case involves sun visors or any product liability claims, nor has DOT ever tried to issue a pure design standard. But one cannot read the opinions cited in the petition and not recognize a fundamental difference in what those courts

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[2] Respondent, but not the court of appeals, argues (p. 24 and n. 15) that the mounting features of the sun visor are stated in performance terms and that somehow that satisfies the performance requirement of the statute. If that were the case, the slightest performance tail could wag the largest design dog, thereby undermining the basic judgment by Congress, explained in the petition (at 15-16) that DOT's standards for automobile safety must be stated in terms of performance and not design.

conclude automotive safety standards must contain, compared to how the court of appeals here viewed what DOT may do. We further note the conspicuous absence of any attempt by respondent to refute our claim that the *industry* itself has always taken the position that DOT has no authority to issue design standards. Nor does respondent disagree that, when the industry has challenged DOT standards in court, one of the grounds has been that DOT strayed too far from the performance requirement under the statute. Petition at 19-20.

Moreover, as we pointed out in the petition (at 17), the citations to the Federal Register on which the court of appeals relied were no more than descriptions of existing standards in an agenda of possible agency activities. They were not issued as part of a final rule, or even a notice of proposed rulemaking, and hence can have no binding or even persuasive effect, especially given the numerous other authorities (including those from DOT itself) that make clear that DOT's position is directly at odds with that of the court of appeals below. But if there is any doubt on this issue, the Court could ask for the views of the United States.

3. Although we believe that the "enforced quietus" point is flawed because it is premised on a mistaken view of whether the sun visor standard is valid as a design standard, it is also inapplicable here because it overlooks what actually took place in the trial court. As the petition shows (at 25), respondent chose to defend this action principally on the ground that the concrete-hard sun visor was not the cause of the injuries to petitioner's decedent. Thus, an instruction to the jury that the sun visor complied with federal standards would have been of no help to respondent since that was not the focus of its defense. In any event, respondent's motion for a mistrial in the district court did not allege that the court's reversal on the effect of the

standard had deprived it of the opportunity to show compliance, and hence that argument was waived. *Diersen v. Chicago Car Exchange*, 110 F.3d 481, 485 (7th Cir. 1997). At the very least, the failure to seek a new trial on this ground undermines any claim that the inability to present such a defense was other than harmless error.

Even more fundamentally, a claim of enforced silence does not relieve the allegedly silenced party from making an offer of proof under FRE 103(a)(2) as to what evidence it would have offered if it had been allowed to do so. *Pau v. Yosemite Park & Curry Co.*, 928 F.2d 880, 887, 888 (9th Cir. 1991). Nor can that failure be overlooked here on the theory that it is plain from the record what evidence respondent would have offered, even without a formal offer of proof. To the contrary, given respondent's focus on causation, and the absence of *any* effort to show that the visor was reasonably energy-absorbing, the failure to make a proffer on this issue was not the result of any enforced silence, but rather part of respondent's basic strategy.

Moreover, there is no substance to the charge that petitioner extensively argued to the jury that respondent failed to comply with the sun visor standard before the trial judge reversed his ruling on the relevance of the standard. To begin with, although the court of appeals made the charge (Pet. App. 5a), it did not provide a record citation -- because there is none. Of course, much of the evidence presented by petitioner bore on the issue of whether the protection afforded by respondent's sun visor was "reasonable" as petitioner contends that the DOT standard requires. But even respondent does not contend that such evidence should have been excluded since, as it conceded in the district court (Supp. App. 67), it was relevant to other issues, including petitioner's claim that the protection was

inadequate as a matter of Illinois law, without regard to any federal standard.

Contrary to the impression given by the court of appeals and respondent, none of petitioner's witnesses testified that respondent's standard violated federal requirements. On the other hand, there was direct testimony from respondent's own former engineer, Susan Gatchell, that she had certified the visor's compliance with §3.4.1 and that it was her opinion that it did comply (Supp. App 1-11). Thus, if anyone had the right to claim prejudice from the district court's reversal of position and an "enforced quietus," it is petitioner, not respondent, but there is surely no basis for the court of appeals to have held that this reversal caused anything more than harmless error to respondent.[3]

4. In its final effort to avoid review, respondent claims that allowing petitioner's expert to give his opinion that

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[3] Contrary to the suggestion made at least twice in the opposition (at 6, 20), the state of the record when the reversal occurred also explains the initial reaction of petitioner's counsel that his client could not get a fair trial. At that point, respondent's witness had testified that the standard had been met, but petitioner's engineering witness would be denied the opportunity to respond (App. 342; Supp. App. 61-62). Respondent's counsel understandably agreed with the ruling and proposed a curative instruction (Supp. App. 65); it was not until the next day that respondent moved for a mistrial (App. 348). Thus, taken as a whole, these events show that, whatever prejudice might have resulted from the trial court's reversal of its position regarding the sun visor standard, it was surely not sufficiently harmful to respondent to warrant a new trial.

General Motors removed padding from the visor in order to save money was, by itself, sufficient prejudicial error to require a new trial. Respondent contends that the court of appeals would have ordered a new trial on this ground alone, but there is no basis for such blatant speculation. *See* Pet. App. 9a.

More significantly, any argument that this error alone would require yet a third trial is plainly without merit. As the court of appeals recognized (id.), the jury surely could have drawn the inference that respondent's decision to remove energy-absorbing padding was motivated by a desire to save money, even without any direct testimony on that point. Indeed, given the state of the record, it is hard to imagine any other inference that might have been drawn. There is, of course, nothing wrong with saving money -- unless it unreasonably puts lives at risk, which is the ultimate question for the jury in this case. Assuming that the court of appeals is correct in its evidentiary ruling, it is virtually inconceivable that it would have ordered a third trial *solely* because a witness for the plaintiff was, at one point in a six week trial, allowed to speculate that the defendant had removed additional protection in sun visors to save money. As the petition explains (at 22-27), the court of appeals' disregard of well-established law in granting a new trial based on its de novo review of the record below, instead of deferring to the district court's finding of harmless error, is an independent basis for granting the petition. But despite that error, there is no basis to conclude that the appeals court would have gone so far as to require a new trial based on a single common-sense, albeit inadmissible, opinion offered by one witness. To find prejudicial error and overturn a jury verdict because that statement was allowed in evidence would be the functional equivalent of repealing the harmless error rule.

5. This petition directly presents a vitally important question regarding whether DOT may use design standards, that contain no enforceable performance requirements, to regulate automobile safety. The court of appeals ruling that DOT may use pure design standards -- and that it did so for sun visors -- conflicts with every other court, agency, and industry group that has considered the issue, thereby threatening to cause serious turmoil in the field of automotive safety regulation. Moreover, this erroneous ruling will, if uncorrected, necessitate a third trial in this case because there is no basis for a new trial unless the court of appeals is correct on the central issue of federal law.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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